

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ARTURO ESPARZA MACIAS, et al. : Civil Action No.
vs. : 3:19cv830
MONTERREY CONCRETE, LLC, et al. : September 16, 2020

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE COURT: Hello. This is Macias against Monterrey Concrete, 3:19CV830. Who is here for whom starting with counsel for the plaintiff, and when you speak, please give your name so the court reporter will know about it. Hello? Anybody there? Hello?

MR. REDMOND: Good afternoon, Your Honor. This is Bob Redmond and Mitch Diles. I think we got cut off when we were on hold. Are you prepared for us to conference in the plaintiffs, Your Honor?

THE COURT: Yes. I cut you off. I'm sorry. It has to do with the technical difficulties with my brain.

MR. REDMOND: Your Honor, they're on the line. Let me conference them in right now. Thank you.

Your Honor, it looks like the plaintiffs are in. Ian, are you there?

MR. HOFFMAN: Yes, Your Honor. Good afternoon. Ian Hoffman from Arnold & Porter on behalf of the plaintiffs.

THE COURT: This is Macias against Monterrey Concrete, 3:19CV830. So, who is it that's here for the plaintiff?

MR. HOFFMAN: This is Ian Hoffman, Your Honor, from Arnold & Porter. I'm happy to proceed if Your Honor is ready.

THE COURT: Is anybody else here from Arnold &

1 Porter?

2 MR. HOFFMAN: Yes, Your Honor. My colleague Preston
3 Smith who was also present at the motion to dismiss hearing is
4 present. Also on the line is another Arnold & Porter attorney
5 name Daniel Cantor, C-a-n-t-o-r. Mr. Cantor has not yet
6 entered his appearance, but he will. He's just listening in
7 today. We also have Mr. Jason Yarashes from the Legal Aid
8 Justice Center who is also counsel in the case and is present
9 on the line.

10 THE COURT: All right, and for the defendants?

11 MR. REDMOND: Good afternoon, Your Honor. It's Bob
12 Redmond and Mitch Diles, both of McGuireWoods.

13 THE COURT: All right. Well, this thing got started
14 because there was this motion for a protective order.

15 MR. HOFFMAN: I'm sorry, Your Honor. I'm having
16 trouble hearing you.

17 THE COURT: Plaintiffs called in here wanting to talk
18 about two discovery disputes, and then there came in a motion
19 to enter a protective order, ECF 39, and a motion to strike it,
20 ECF 40, then a supporting memo, ECF 44. So what's the
21 discovery dispute, Mr. Hoffman?

22 MR. HOFFMAN: Again, good afternoon, Your Honor. May
23 it please the Court, I believe there are two discovery
24 disputes, at least from plaintiffs' perspectives. Mr. Redmond
25 might want to raise other issues, and I will let him do so, but

1 the two issues from plaintiffs' perspective, Your Honor, are,
2 number one, whether the deposition of certain of our clients,
3 the plaintiffs, that are located in Mexico, whether those
4 depositions should be conducted remotely via Zoom or similar
5 technology or whether they must be conducted in person in
6 Richmond.

7 That's issue number one, and I'm prepared to address
8 that issue today. The parties have met and conferred about it,
9 but we have not been able to resolve the issue.

10 The second issue, Your Honor, is whether the
11 defendants may seek discovery of the immigration status,
12 immigration status information about the plaintiffs both
13 through written discovery like interrogatories and also through
14 deposition questions.

15 And plaintiffs' position is that whether plaintiffs
16 are here illegally or have been here illegally in the past or
17 undocumented or that kind of discovery and those types of
18 questions should be subject to the protective order and should
19 be out of bounds, Your Honor, and so I'm happy to address those
20 two issues in whatever order you would like.

21 The -- obviously the Court recognizes that there's
22 been some filings recently, and I'm happy to address those if
23 the Court wishes.

24 THE COURT: Let's take the issues of depositions
25 first. What's your position?

1 MR. HOFFMAN: Our position, Your Honor, is that
2 there's sufficient special circumstances and good cause under
3 the local rules and under the federal rules to permit
4 plaintiffs to make -- certain of the plaintiffs, Your Honor, to
5 make themselves available for a deposition via Zoom, and I
6 won't keep caveating it, but I'll say Zoom as a shorthand for a
7 remote virtual deposition.

8 There are 17 plaintiffs in this action, Your Honor.
9 Seven of them are currently in the United States, and ten of
10 them are currently in Mexico. Immediately after your last
11 status conference we had with the Court, the next day, I
12 believe, the defendants served 17 deposition notices for all of
13 the plaintiffs for the depositions to start approximately
14 11 days later and continue sequentially.

15 The next business day that I received those notices,
16 I reached out to Mr. Redmond and explained that ten of those
17 individuals are in Mexico and that we would make them available
18 for depositions via Zoom. For the seven that are in the United
19 States, we would commence to make efforts. Notwithstanding
20 COVID and other similar challenges, we would make efforts to
21 bring them for deposition in Richmond before the individuals
22 located in Mexico because of all of the safety concerns related
23 to the COVID-19 pandemic, which are particularly acute in
24 Mexico, as well as there is immigration-related border crossing
25 type of hurdles, that we would gladly make them available via

1 Zoom and that we were making efforts right away to wind that up
2 and make it happen, and we, at the time, were attempting to
3 secure it, and we have since secured local counsel in Mexico
4 near where our clients, most of our clients at least are
5 located in Mexico so that there are (indecipherable).

6 THE COURT: Mr. Hoffman, the combination of the speed
7 at which you are talking and the interference on the signal
8 make it difficult to follow you, so you need to slow it down.

9 MR. HOFFMAN: I apologize very much, Your Honor. I
10 will do my best to slow it down. If the interference issue
11 causes any more problems, please speak up and I'll try
12 something else, but for now I'll slow down.

13 Your Honor, there is --

14 THE COURT: Excuse me a minute, Mr. Hoffman. You say
15 there are ten plaintiffs in Mexico, and because of COVID
16 concerns and border-crossing hurdles, I was under the
17 impression that there were current immigration rules that
18 foreclosed people coming into Mexico -- from Mexico into this
19 country except with certain explicit permissions and for
20 certain reasons. Is that wrong?

21 MR. HOFFMAN: That is not wrong, Your Honor, and I
22 was headed right there, so you're one step ahead of me in the
23 argument. Your Honor, all nonessential travel is barred
24 between the United States and Mexico. All of the normal visa
25 processes at the consulate in Mexico are closed. The only

1 access to visas is for emergency situations, and the only way
2 to get an emergency visa is to travel to a consulate and apply,
3 and there are lengthy wait times, and there are lengthy
4 distances our clients would have to travel, like perhaps an
5 all-day bus trip in the time of COVID in order to even sit for
6 an interview.

7 There are only very narrow types of visas that would
8 even conceivably apply here, and the timetables to get those
9 visas are lengthy, and even if you were to go through the
10 entire process, there's no guarantee that it would be
11 permitted. For example, you know, tourist visas, highly
12 unlikely that would be granted for this kind of travel. It's
13 not for tourism.

14 My understanding from consulting with various
15 immigration counsel who deal with these kinds of issues
16 regularly is that there's lengthy wait times even for those.

17 Other processes like special parole permissions, my
18 understanding is that they take months, three or four months in
19 normal times to even get processed, and there's no guaranteed
20 outcome at the end of that. That's in normal times, not in
21 COVID times.

22 THE COURT: Let me ask you something. Are your
23 clients coming up here to work sometimes? How do they get here
24 when they're going to work?

25 MR. HOFFMAN: My understanding is that -- so, Your

1 Honor, I believe some are here now working, and I don't know
2 the plan of the ten who are in Mexico to come and work. My --

3 THE COURT: How can they have any plans to come and
4 work if they can't get any visas unless they violate the law
5 and slip across the border?

6 MR. HOFFMAN: Your Honor, I have no -- maybe I
7 misspoke. I have no awareness of any plans for any of the ten
8 plaintiffs to come into the United States to work. I was
9 merely pointing out that I think there is a work visa process
10 that would have to be gone through that would have -- they
11 would have to apply through, and my understanding is it would
12 also take a long amount of time, and I think that the current
13 state of the law is -- because of, I believe, certain executive
14 orders, it makes these types of workers extremely -- makes the
15 applications for that type of work extremely unlikely to be
16 granted at this time.

17 THE COURT: Well, as I understand it, they're letting
18 a lot of people in on visas to pick vegetables and fruits and
19 things that work in the agricultural industry, but they're
20 requiring them to be on visas. And how do they get in?

21 Have you actually gone to look at the law and
22 determine what the law says about whether your people could get
23 a visa to come in here and work, Mr. Hoffman?

24 MR. HOFFMAN: Your Honor, I have spoken with
25 immigration counsel who deal with these issues regularly, and I

1 explained my understanding. I don't practice immigration law
2 so I can't cite to you which law and regulations would apply.
3 I would be happy to brief the matter, Your Honor, so we could
4 identify with particularity, but we cross-referenced this with
5 several immigration counsel who deal with it, but I would be
6 happy to follow up, Your Honor, by providing more specificity.

7 But just to be clear, the argument, Your Honor, is
8 that there is enough -- there are enough hurdles here with the
9 immigration-related and visa-related hurdles combined with the
10 COVID pandemic to provide sufficient good cause to permit these
11 depositions to happen via Zoom.

12 THE COURT: Thank you. Let me hear from Mr. Redmond.

13 MR. REDMOND: Good afternoon, Your Honor. On this
14 issue, there's Eastern District of Virginia case law on point,
15 and if I may -- we didn't have a chance to brief it, but I'm
16 citing to *Lafleur v. Dollar Tree Stores*, 2013 U.S. Dist. LEXIS
17 189291, Magistrate Judge Lawrence, now District Judge Lawrence.
18 Plaintiffs are expected to appear for their deposition in the
19 forum where they initiate their lawsuit absent a hardship. It
20 is insufficient for a plaintiff to make unsupported assertions
21 with respect to undue hardship in order to avoid appearing in
22 person for his deposition, collecting cases including *Lerman v.*
23 *Chuckleberry*, 521 F. Supp. 228 requiring plaintiffs to appear
24 at a deposition to submit to a treating physician's affidavit.

25 Also, Your Honor, a more recent case --

1 THE COURT: I'm not going to deal with this now. I
2 just want to know -- with the cases now. Why do you want to --
3 you know, Mexico is probably fourth in the world in COVID
4 problems. What leads you to believe that they could get into
5 the United States anyway?

6 MR. REDMOND: Well, Your Honor, first off, I think
7 at -- we have documentary evidence that four of the ten
8 plaintiffs are already here in the United States: Manuel
9 Esparza, Roderigo Canales Salazar, Alonso Cisneros Ayala, and
10 Jaime Marquez Esparza all have current Facebook profiles that
11 shows that they are in the United States including recent
12 updated photographs that show that these are current profiles.

13 So we believe at least four of the ten are already
14 here, and we have asked plaintiffs to provide some proof that
15 they're in Mexico, and they have not -- declined that
16 opportunity. So we believe that on balance, the evidence shows
17 very clearly that four of the ten are already here.

18 Also we have -- we've had testimony evidence that two
19 others, Leopoldo Gonzales and Luis Carlos Romero, are also
20 here. It's likely that six of the ten are here in the United
21 States, and we've asked for some proof from the plaintiff that
22 they are not, and they have declined that opportunity to prove
23 it. We believe they have the duty to prove that these
24 gentlemen are in Mexico, and they have declined that
25 opportunity.

1 With respect to the remaining, all the plaintiffs
2 that they claim are away, there are two other issues that we
3 think are important, Your Honor. First off, when did these
4 plaintiffs leave for Mexico, because if they left after the
5 case was filed, then the plaintiffs should have petitioned the
6 Court for a deposition prior to -- before time pursuant to Rule
7 30(a), but they didn't. And even if they left for Mexico after
8 they engaged counsel but before they filed the lawsuit, they
9 should have petitioned the Court for a deposition pursuant to
10 Federal Rule of Civil Procedure 27(a).

11 Their failure -- if indeed some or all of these ten
12 plaintiffs have left the United States for Mexico after this
13 lawsuit is filed, that has put us in a difficult position
14 because we are facing a highly fact-intensive lawsuit for multi
15 millions of dollars with translators, and they propose to do
16 this through an internet connection using Zoom.

17 We think that that's going to be inadequate in spades
18 because we'll have to have translators on both sides. It's
19 document intensive. I have lots of document I want to show
20 these folks, and I can't do it effectively over Zoom, or to do
21 so over Zoom would be onerous

22 THE COURT: Hold on just a minute. To begin, it
23 seems to me that I have enough before me at this juncture to
24 require that the matter be briefed with the plaintiff having
25 the burden of proof. Mr. Hoffman, if, in fact, four people are

1 in the United States according to their Facebook pages and two
2 according to some testimony -- I haven't heard any details on
3 that yet -- are in the United States, then your motion has far
4 less force.

5 In addition, you have the burden of showing how an
6 effective deposition can be taken of the other four. But if
7 you've got six in the United States, pony them up for
8 deposition right now and stop arguing over it it seems to me is
9 the answer to that question.

10 Mr. Redmond, have you shown the plaintiffs' lawyers
11 your proof that four -- I'm not going to try their names and
12 nobody else is, and you need to give Ms. Peterson the spelling
13 of their names, of the four that you say have been reported on
14 Facebook and the two that you say have been reported on
15 testimony so she can have it for the transcript and I can have
16 it.

17 But have you given them the proof that you say you
18 have about the presence of these six people in the United
19 States?

20 MR. REDMOND: I have given them -- Your Honor, thank
21 you. I have given them Mr. Jaime Marquez Esparza's Facebook
22 page, and I will commit to giving them, before close of
23 business today, the three remaining Facebook pages for Manuel
24 Esparza, Rodrigo Canales Salazar, and Alonso Cisneros Ayala.

25 THE COURT: What about the testimony you are talking

1 about as to the other two?

2 MR. REDMOND: I will get -- it's in my notes, Your
3 Honor, and if it's not committed to an affidavit, I'll get that
4 committed to an affidavit, Your Honor.

5 THE COURT: All right. It seems to me on the issue
6 of where the depositions be taken, it's the rule that they're
7 to be taken here in the forum where the case was filed absent a
8 showing of good cause to the contrary, and it's the burden of
9 the plaintiff who wants to have the depositions of the
10 plaintiffs taken somewhere else to prove an exception and to
11 prove good cause, and the papers -- the oral statement just
12 doesn't get the job done.

13 So I'll require a brief on it, but I do think it
14 would be a good idea for you to, even before then, provide the
15 information you are talking about, Mr. Redmond, to the
16 plaintiffs' counsel. If those people are in the United States,
17 set the depositions now, Mr. Hoffman, and don't let them go
18 back home before you do it.

19 And then as to the other four, you do need to make a
20 showing about when they left and why you didn't do what the law
21 gives you a right to do to preserve their testimony. That's
22 the way it is. So you have -- when are you going to file your
23 brief, Mr. Hoffman, on leave to take depositions other than in
24 Richmond?

25 MR. HOFFMAN: Your Honor, I believe we can file that

1 on Friday.

2 THE COURT: Okay. That day is -- what day of the
3 month is that?

4 MR. REDMOND: 18th, Your Honor.

5 MR. HOFFMAN: I'm sorry, Your Honor.

6 THE COURT: All right. You're going to file your
7 brief. Mr. Redmond, when are you going to file your response?

8 MR. REDMOND: September 25th, Your Honor, one week
9 later if that's permissible with the Court.

10 THE COURT: That's fine. And your reply?

11 MR. HOFFMAN: Your Honor, we can file -- yes, Your
12 Honor. I'm looking at my calendar. How about Wednesday,
13 September 30th?

14 THE COURT: All right.

15 MR. HOFFMAN: Your Honor, may I respond briefly to
16 some of the points Mr. Redmond made?

17 THE COURT: Well, you can. You're going to have an
18 opportunity to do that in your papers, but go ahead.

19 MR. HOFFMAN: Thank you, Your Honor. I just want to
20 underscore that we have been attempting to work all this out in
21 good faith, and we've been attempting to bring every plaintiff
22 who is in the United States to the district to sit for a
23 deposition.

24 Your Honor, we are not trying to play any games here,
25 and I represented to Mr. Redmond as an officer of the court

1 that these individuals were in Mexico. Mr. Redmond also knows
2 that during the mediation that we conducted by Zoom, I believe
3 seven or eight of our plaintiffs who are in Mexico participated
4 from Mexico by Zoom in that mediation.

5 And, Your Honor, I'm glad you asked for the proof
6 because I had the very same questions. I made the
7 representation to Mr. Redmond that these gentleman be
8 confirmed, that contend are in Mexico, and I asked him please
9 provide the proof that you think they're not in Mexico so that
10 we can try to sort out this confusion. Mr. Redmond's response
11 was that's work product, I can't tell you because that's work
12 product.

13 Now our understanding is that his proof is a Facebook
14 profile page. All we know is for one of them. So we will
15 happily rebut this evidence. I think it's -- it could have
16 been worked out sooner, and we'll put all of this into our
17 responsive papers, Your Honor.

18 MR. REDMOND: Your Honor, this is Bob Redmond. May I
19 have a moment to respond to one of the comments that was made?

20 THE COURT: Yes.

21 MR. REDMOND: At the mediation, we were never told
22 that people on the video were in Mexico. We were told that
23 some of the plaintiffs are appearing by video. That's what we
24 were instructed. We're not misleading the Court. We didn't
25 mislead plaintiffs' counsel. I explained to plaintiffs'

1 counsel that the burden is on them to show that these
2 individuals are not in the United States, and I don't think
3 it's a fair characterization to say we misled the Court or
4 them. So that's all I have to say about that, Your Honor.

5 THE COURT: Well, I actually have to say that you all
6 need to quit worrying about whether somebody is accusing you of
7 doing something wrong. You come here with the presumption that
8 -- you all are officers of the court, and so I presume that you
9 don't do things wrong.

10 The other thing is, you need, when you are talking
11 about the other side, conduct of the lawyers, you need to be
12 careful in your choice of words so you don't leave it open to
13 the interpretation that you are, in fact, pointing fingers,
14 people misrepresenting or something. That's the way we conduct
15 business here, folks, so let's keep that up, and we'll be all
16 right.

17 Now, the next thing is the immigration status that
18 you wanted to deal with. What are you talking about there, Mr.
19 Hoffman?

20 MR. HOFFMAN: So, Your Honor, Ian Hoffman again. We
21 received voluminous written discovery requests from defendants,
22 and we have worked through them and served our objections to
23 them last night. We understand from those requests and from
24 other indications from the defendants that they intend to seek
25 discovery into our clients' immigration status at various

1 times, and by immigration status I mean whether they are
2 presently living and working in the states illegally, whether
3 they worked illegally at any other time, for example when they
4 left the employment of Monterrey Concrete or, again, at any
5 other time.

6 Several of the discovery requests go to this, and so
7 we have, obviously, depositions coming up, Your Honor, and so I
8 wanted to raise this issue before the deposition started that
9 plaintiffs -- and the law is clear that in these types of
10 cases, particularly FLSA cases, an employee's immigration
11 status is irrelevant, and even if it had some marginal
12 relevance, there is a high risk that seeking discovery of this
13 type of information would lead to a potential for feelings of
14 harassment and chilling of parties' rights.

15 So I don't think that there's any relevance to these
16 parties' immigration status, whether that's current or at times
17 in the past, and we are not trying to block any legitimate
18 discovery efforts that the defendants want to take to build
19 their case, but we think that crossing the line into whether
20 and when each plaintiff was here illegally and whether they
21 acted illegally or whether they overstayed visas or entered
22 without visas is outside the scope of the issues in the case,
23 and seeking aggressive discovery on that could lead to that,
24 warrants a protective order, Your Honor. That's our position
25 on that. So we would seek an order declaring that discovery,

1 including deposition questions aimed at soliciting the type of
2 immigration status information, are barred.

3 THE COURT: Why do you need the immigration
4 information, Mr. Redmond?

5 MR. REDMOND: Your Honor, we filed our answer on
6 June 24th, and nearly every single affirmative defense
7 addresses the fact that these gentlemen engaged in fraud on
8 Monterrey Concrete by intending to enter the country using the
9 Monterrey Concrete visa and then leaving Monterrey Concrete to
10 work illegally in the United States.

11 It's fraud in the inducement. It is a contract
12 offense. It was known to the plaintiffs on June 24th. We
13 served our discovery on August 28th. We had numerous discovery
14 requests addressed to the fact that these gentlemen came to
15 Monterrey Concrete with the full intention of jumping ship
16 during their time and working illegally in the country.

17 They didn't say anything about this issue until
18 yesterday at 4:00. I told Mr. Hoffman by email yesterday and
19 again today that we are -- this is a significant, significant
20 issue that requires briefing, and I requested that he not raise
21 it with the Court on this call because it requires briefing.

22 To address why we need this, it's because they claim
23 that they entered into a contract with Monterrey Concrete, and
24 we think that they entered into an effort, a fraudulent effort
25 to get into the country using our visas and jump ship, and we

1 have ample evidence to show that's what most of them did,
2 nearly all of them. That directly rebuts, A, the contract
3 claims; B, the TVPA claims, and, to some degree, the FLSA
4 claims. This is not an FLSA claim. We wish it was. It's a
5 TVPA case with horrendous accusations against a small
6 businessman claiming that he's put people in slavery and made
7 them work 24 hours a day in some circumstances. So we need --

8 THE COURT: Has the Fair Labor Standards Act claim
9 been dropped?

10 MR. REDMOND: Your Honor, we're all ears on that one.
11 We have not heard from the Court on that.

12 THE COURT: No --

13 MR. REDMOND: Plaintiffs have not dropped it.

14 THE COURT: All right.

15 MR. REDMOND: Your Honor, if I could just wrap this
16 up briefly --

17 THE COURT: What is your docket number of your
18 answer?

19 MR. REDMOND: It is 25, Your Honor, and the
20 affirmative defenses can be found on page 23 of 24.

21 THE COURT: Well, there are two affirmative
22 defenses -- there are two affirmative defenses, three of that
23 sort, but then there's one that says they're unlawfully present
24 in the United States and, therefore, lack the capacity to sue.
25 Is that the law?

1 MR. REDMOND: I believe that is the law, Your Honor,
2 but I will make sure that's the case. I believe that is based
3 on the law.

4 THE COURT: All right. Okay.

5 MR. REDMOND: For the record, Your Honor --

6 THE COURT: All right, Mr. Hoffman.

7 MR. HOFFMAN: Just starting on the last part, Your
8 Honor, I don't have the case law handy at present, but I would
9 not concede that that is the state of the law, that someone
10 who's unlawfully present in the United States lacks the
11 capacity to sue. But we can certainly back get back to the
12 Court on that if the Court wishes.

13 I don't think that any of these affirmative defenses
14 change the analysis. If Mr. Redmond wants to argue that -- and
15 seek discovery that my clients left his employment for some
16 other reason other than the treatment that they were receiving
17 and the lack of pay that they were receiving, I think he can
18 elicit that. The issue is whether he can elicit that they
19 acted illegally in terms of immigration status when they -- in
20 connection with any other work they did for anyone else in the
21 United States really at any time.

22 And so if he wants to develop a case that our clients
23 didn't intend to work for Monterrey Concrete, I'm not sure that
24 that would even touch on immigration status. It's the
25 illegality and --

1 THE COURT: Let me stop you there a minute and ask
2 both of you something that I don't know the answer to. Tell me
3 what you know. If I get a visa to come to work in the United
4 States, is that visa to work for Joe Smith's company, or is it
5 just to work?

6 MR. REDMOND: Your Honor, this is Bob Redmond. It is
7 the former. Visas are employer specific. They are not general
8 passes to let people work in the United States, and there are
9 requirements that Monterrey Concrete have to report to the
10 Department of Labor if employees or visa holders, like the 17
11 plaintiffs in this case, leave before their term. And, in
12 fact, that's a very big part of it, and it is inevitable that
13 the fact that they left Monterrey Concrete and went to work for
14 years at other concrete companies in Richmond or Dallas or
15 Tennessee or places like that, that that will engage in our
16 defense.

17 And the fact that Mr. -- that the plaintiffs have
18 just raised this issue yesterday at 4:00 when we have a
19 deposition starting on Monday morning is problematic to us. We
20 think this is a huge issue and should be fully briefed. We
21 talked about it in our answer and we talked about it in our
22 discovery. It was a lively topic in the mediation --

23 THE COURT: All right. Okay. That's enough. I
24 agree it should be briefed, but I guess my first question is
25 who has the burden on the question. Since the defendant wants

1 the protective order and wants the -- I mean the plaintiff
2 does, I think the plaintiff starts it, you respond, and they
3 reply. We'll follow that -- do you want to do that on the same
4 schedule that you have on the others, or do you want to do it
5 later?

6 MR. REDMOND: Your Honor, this is Bob Redmond. We
7 would prefer to do it later, and, in the interim, we will
8 provide a running objection to those questions to the three
9 depositions we have scheduled next week because we think it's
10 imperative to get these depositions started. We have a
11 discovery cutoff in just a few months, and we prefer not to
12 delay these depositions while the Court addresses this issue.

13 MR. HOFFMAN: Your Honor, this is Ian Hoffman for
14 plaintiffs. Our first preference, Your Honor, would be, if at
15 all possible, to get this issue resolved before the depositions
16 start because of the type of chilling effect, and, again, Your
17 Honor, taking your prior admonition to heart, Your Honor, I
18 want to be clear that I'm not accusing Mr. Redmond of
19 harassment, but that's the language that the case law uses for
20 the effect that these kinds of discovery requests can have on
21 plaintiffs who are trying to exercise their lawful right.

22 I fear that the effect of these questions at a
23 lengthy in-person deposition will not be good, Your Honor, and
24 that we would seek protection from that. I provided the case
25 law authority that we believe supports the request to Mr.

1 Redmond already, and I'm happy to provide that authority to the
2 Court, and perhaps, you know, if Mr. Redmond could provide any
3 counter authority by the end of this week, we could try to get
4 a quick decision on this issue. That would be our first
5 preference.

6 THE COURT: That might be your preference, but I'm
7 not going to give you a decision on it quickly. I have several
8 other things including a decision sitting on my desk about your
9 complaint that I'm working on. When do you want to brief it?
10 I would think the proper procedure is that at the deposition,
11 you ask the question, and then the plaintiff's lawyer can
12 instruct the witness not to answer and then it will be on the
13 record what the question is.

14 Meanwhile, let's brief it. I want the precise
15 question. So when do you want to file your papers on the
16 immigration issue, gentlemen? When do you want that done?

17 MR. REDMOND: If the Court wants to proceed in that
18 manner, which makes sense, I would recommend that we have the
19 depositions next week. We get the transcripts, plaintiff files
20 his motion on the 25th, we file our opposition on the 30th, he
21 files -- actually we have another deposition on the 2nd, so,
22 Your Honor, may be best if we just do all the depositions and
23 then brief it.

24 So we could brief it on October 16, he files his
25 motion for protective order on October 16th, we would file an

1 opposition on October 23rd, he files his reply October 28th.
2 If the Court grants our -- rules in favor of the defendant and
3 identifies the questions that can be answered, we can call
4 these folks back and ask them the questions and get the answers
5 that way. That's my recommendation, Your Honor.

6 THE COURT: Any objection?

7 MR. HOFFMAN: Your Honor, this is Ian Hoffman. I
8 just need a little bit of clarification of the Court's
9 direction. Is the Court envisioning that I would -- that
10 counsel defending these depositions would be permitted to
11 direct the witness not to answer?

12 THE COURT: Yes. I just told you that.

13 MR. HOFFMAN: Okay.

14 THE COURT: This is a situation where I need to see
15 the question that is asked before making a ruling. I don't
16 want to make a general ruling on immigration information. I
17 need to know the extent to which the particular question may
18 pertain to the particular defense that is being asked about.

19 I can understand the argument that if these people
20 signed up with Monterrey and all the time it was their intent
21 to go somewhere else, then you need to know what their
22 immigration status was at particular times, and -- but I can't
23 link it precisely, so I need to have it briefed, and I think
24 the best way to do it is conduct the depositions and then
25 it's -- in order for you to preserve the issue you're going to

1 brief, you have to tell them not to answer the question, and
2 that's perfectly all right when you have the imprimatur of The
3 Court to allow you to do that. Then is the schedule all right
4 with you then that he suggested, Mr. Hoffman?

5 MR. HOFFMAN: I'd rather it be done jointly on a
6 faster basis, Your Honor. I would be okay with briefing being
7 done after the first three depositions, so that puts our brief
8 due on September 25.

9 THE COURT: Wait a minute. How many depositions are
10 there and when are they being taken?

11 MR. REDMOND: Your Honor, this is Bob Redmond. There
12 are seven depositions being taken. The first three are
13 September 21, 22, 23. Then there's a deposition on
14 October 2nd. Then there's a deposition on October 5th, 6th,
15 and 7th, and those are the depositions that are currently
16 scheduled.

17 THE COURT: And that's a total of three depositions
18 on the 21st through the 23rd of September, three on the 5th,
19 6th, and 7th of October, and one on the 2nd; is that right?

20 MR. REDMOND: Yes, Your Honor, that's correct.

21 THE COURT: And then you would file when, have the
22 plaintiff file when?

23 MR. REDMOND: Your Honor, I would recommend that the
24 plaintiff obtain the transcript, file his motion for protective
25 order on October 16th, we would file our opposition on

1 October 23rd, he file his reply on October 28th. That would
2 allow us to have time to get the transcripts for all of the
3 depositions that are at issue and then identify for the Court
4 the questions that are subject to the Court's ruling.

5 THE COURT: All right. I think that schedule makes
6 sense. Why is it not best to get all the depositions taken and
7 get the questions on the record and do it that way, Mr.
8 Hoffman?

9 MR. HOFFMAN: Two reasons, Your Honor. Number one, I
10 think that the first three depositions will give us ample
11 guidance on how the remaining depositions are going to go. I
12 don't see a particular need to go all the way through all seven
13 before knowing the kinds of questions that Mr. Redmond is going
14 to ask. I think the first three will be sufficient to give the
15 parties and the Court guidance.

16 The second concern I have, Your Honor, is that
17 because of all the logistical difficulties with bringing these
18 plaintiffs to the district for their deposition, I'm not sure
19 what Mr. Redmond's position is going to be, if he's going to
20 recall all of them to travel back to Richmond to sit for a
21 follow-up deposition depending on the Court's ruling, so I'm
22 trying to minimize the risk that we have to have 14 depositions
23 instead of seven.

24 MR. REDMOND: Your Honor, if I may speak briefly to
25 that. I have already started preparing for these depositions,

1 and the questions are not the same. These are individuals with
2 different fact patterns. They are at different experiences in
3 Monterrey. I have different evidence that I'd like to ask them
4 about. So I don't think it's accurate to say that everything
5 covered in the first three depositions is going to apply to the
6 remaining four depositions. I think it just makes more sense
7 to do it the way we've suggested.

8 THE COURT: All right, thank you, gentlemen. I would
9 prefer to have them, all the depositions done and the questions
10 down, and then it will narrow what you all are going to argue
11 about. It will also permit you to put different questions into
12 categories, and it will make more sense in the long run. So if
13 you finish the depositions on the 7th, you'll be getting the
14 transcripts all along. Any reason you can't file on the 16th
15 of October, Mr. Hoffman? You want it later, or what?

16 MR. HOFFMAN: I think the 16th of October is fine,
17 Your Honor. I understand the Court's ruling.

18 THE COURT: 16th of October you file your brief on
19 the questioning about the immigration questions raised in the
20 depositions. Mr. Redmond, the defendant will file a response
21 on October 23rd. Then the plaintiff, you want to file your
22 response when -- your reply on the 28th, is that what one of
23 you said? Is that the schedule you want, gentlemen?

24 MR. HOFFMAN: Yes, that's what Mr. Redmond proposed,
25 and I think that's fine on the 28th.

1 THE COURT: Okay. Is there anything else we need to
2 go over now?

3 MR. REDMOND: Your Honor, this is Bob Redmond, Your
4 Honor.

5 THE COURT: Excuse me. I think the motion for
6 protective order, ECF number 39, and the motion to strike, ECF
7 number 40, are moot given what we've just decided. Do you all
8 agree with that?

9 MR. REDMOND: Your Honor, this is Bob Redmond. We
10 agree the motion to strike is moot. The motion for protective
11 order addressed the privilege log and --

12 THE COURT: That's right. You are right. I'm sorry.
13 The privilege log.

14 MR. REDMOND: We agree that the motion to strike is
15 moot, and there's no reason for the Court to rule on that.

16 THE COURT: All right. So there is a motion for
17 protective order on a privilege log and a supporting brief, but
18 you haven't replied to it.

19 MR. REDMOND: Your Honor, that's correct. We just
20 got that last night at 11:38.

21 THE COURT: What have you been doing?

22 MR. REDMOND: On the privilege log, Your Honor?

23 THE COURT: In the meantime since 11:38, come on.

24 MR. REDMOND: Your Honor, getting ready for this
25 call.

1 THE COURT: All right. So when are you going to
2 file -- as a general proposition, I don't really understand
3 what the basis for the protective order is, but go on and file
4 your response brief. When are you going to file it?

5 MR. REDMOND: Your Honor, we would like to file that
6 next Friday if possible.

7 THE COURT: What date is that?

8 MR. REDMOND: That is September 25th.

9 THE COURT: All right. And then you want to file
10 your reply when, Mr. Hoffman?

11 MR. HOFFMAN: Your Honor, I believe we could file on
12 Thursday, October 1st.

13 THE COURT: Okay. All right. That is the response
14 to -- excuse me a minute. The response to number 39 and 44 --
15 44 is a memo in support of 39, so the response will be
16 September 25, and the reply will be October 1; is that right?

17 MR. HOFFMAN: Yes, Your Honor.

18 THE COURT: Have you all rethought your positions
19 about trying to settle the case now that you've been doing all
20 the arm-wrestling you've been doing?

21 MR. REDMOND: Your Honor, this is Bob Redmond. We
22 are ready, willing, and able. We know that Magistrate Judge
23 Stillman retired and is engaging each side by telephone in the
24 immediate past couple of days. We are happy, happy, happy,
25 happy to continue discussions.

1 MR. HOFFMAN: Your Honor, this is Ian Hoffman for the
2 plaintiffs. Of course we're always open and interested in
3 getting a fair resolution to the case. We just haven't been
4 able to to date.

5 THE COURT: This is a jury trial, is it?

6 MR. REDMOND: Yes, Your Honor, it is.

7 MR. HOFFMAN: Yes, Your Honor.

8 THE COURT: What do you see as the scope, the amount
9 of the recovery that is obtainable in this case, Mr. Hoffman,
10 in terms of dollar amount? Assume you win. What's the
11 damages?

12 MR. HOFFMAN: Your Honor, it's over two and a half
13 million dollars, I believe. I'm pulling up my initial
14 disclosures because I want to be precise with it, but that's
15 the ballpark that we're in, Your Honor, because the Fair Labor
16 Standards Act overtime claims alone I believe -- I'm having
17 trouble putting my fingers on the initial disclosures, but I
18 believe it's over 6- or \$700,000, and those are doubles as a
19 matter of the statute plus recovery of attorneys' fees on top
20 of that. That's totally setting aside the TVPA damages which
21 are also very high.

22 MR. REDMOND: Your Honor, this is Bob Redmond. I
23 have initial disclosures at the ready. They're asking for
24 over, well over \$4 million.

25 THE COURT: Well, that's very ambitious. I hope you

1 are able to settle it. Meanwhile, we've got a schedule, and
2 we'll go forward. So thank you all very much.

3 MR. HOFFMAN: Thank you, Your Honor. There is one --

4 MR. REDMOND: There is one discovery motion
5 outstanding that hasn't been raised, but 38 was filed on
6 Friday, September 11th. 37 and 38.

7 THE COURT: What are they? I don't know that I've
8 read them.

9 MR. REDMOND: It is defendant's motions for sanctions
10 under Federal Rule 37(b)(3) because Mr. Esparza did not attend
11 his deposition.

12 THE COURT: Esparza.

13 MR. REDMOND: I think it's one of the several
14 Esparzas. This is Jaime Marquez Esparza.

15 THE COURT: Has that been briefed?

16 MR. REDMOND: It's been filed by us. They have not
17 opposed it, Your Honor. I don't think under the standard
18 schedule it's due yet. We filed it Friday, September 11th.

19 THE COURT: Well, then, they have time to file a
20 response. Are you planning to respond, or are you going to
21 agree to sanctions?

22 MR. HOFFMAN: Of course we plan to respond with our
23 position, Your Honor, and I'm happy to answer any questions
24 about that. It certainly overlaps with the first issue we
25 spoke of today, and as Mr. Redmond said, he didn't show up for

1 his deposition. This is one of those gentlemen who is in
2 Mexico, and there's been, you know, close communications with
3 Mr. Redmond all along he's in Mexico.

4 THE COURT: Just brief it in the ordinary course, but
5 I'm going to tell you something. If any of these people turn
6 out to be in the United States that he's talking about -- Mr.
7 Redmond, remember you need to send the names to Ms. Peterson.

8 MR. REDMOND: Yes, sir.

9 THE COURT: For all of the ten you were talking about
10 and what category they're in so we'll know what you're talking
11 about. You went through that with lightning speed. If it
12 turns out that they're in the United States, then you get them
13 here to get them deposed. You work it out. Because there will
14 be a cost associated if I find they are and they haven't been
15 brought to Richmond to be deposed. All right. I'll hear your
16 brief in the ordinary course on the others.

17 MR. REDMOND: Thank you, Your Honor.

18 MR. HOFFMAN: Thank you.

19 THE COURT: Thank you very much. Bye-bye.

20

21 (End of proceedings.)

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Date _____